(1)

Supreme Court, U.S.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JACK SHARWELL ---PETITIONER

VS.

U. S. GOVERNMENT ETAL --- RESPONDENT(S)
ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS 6TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JACK SHARWELL
20201 N. PARK BLVD
CLEVELAND, OHIO 44118
216-371-0350

83pp

QUESTION(S) PRESENTED

I am A Pro Se Litigant held to the same standards as attorneys?

U. S. Government did not produce evidence?

U. S. Government stated that I advertised, bought and shipped chemical and plastic resins?

U. S. Attorney L.A. accepted F .B. I. complaint of First National City Bank, L. A., causing indictment for commercial transaction in Taiwan?

U. S. Attorney Keller knowingly accepted false information presented by F. B. I. causing three count indictment?

Interest of U. S. Citizens in U. S. Government's illegal prosecution and illegal imprisonment?

Judge Manos did not reverse his decision after reading grand jury dismissal of criminal charges in count one?

I was sentenced for criminal activity where no motive, intent, physical or monetary loss incurred?

Judge Manos sentenced me to prison knowing that commercial transactions are civil not criminal?

U. S. Government had no jurisdiction since we did not recognize Taiwan, China in 1973?

Where is criminal act.

All three count in indictment?

All three counts in indictment?

Sentenced to prison after pleading guilty in count one?

That the Grand Jury dismissed all criminal activity?

U. S. District Court Jurisdiction over illegal sentencing, illegal prosecution?

U. S. District Court hiding records regarding sentencing?

Sharwell interpretation of claim is his lawsuit

filled?

Due Process denied?

Two year limitation on U. S. Government illegal imprisonment, illegal prosecution?

Judge K. O'Malley and court of appeals two year limitation on government illegal prosecution illegal imprisonment?

Government protection of U. S. Citizens?

Constitutional protections and civil rights?

Deprivation of rights?

Need to prevent?

U. S. Government refusal to defend against illegal and prosecution and illegal imprisonment?

Judge O'Malley and Appellate Court knowingly dismissed court case where no criminal activity exited?

Why did Spenser Sharwell worked for me less than three weeks after he went broke?

Why did Spencer Sharwell have letter typed in my office authorizing shipment of plastic resins and chemicals using my name?

Why immediately thereafter, F. B. I. interrogation of Spencer Sharwell in Cleveland and complaint of First National City Bank L. A that does not exist?

An immediate Grand Jury Indictment presented by U. S. Court in California?

U. S. District Court, L. A. ?

CR 76- 1368 Marbon District. Case No. 76-1368

Indictment states Jack Sharwell as doing business and owner of Marbon?

3,000,000.00 L/C's plastic resins

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Janet Reno, Attorney General
National City Bank, L. A.
F. B. I., Cleveland, Oh
Spencer Sharwell
William Keller, U. S. Attorney L.A.
Herbert Berkowitz, U.S. Attorney Cleveland
Judge John Manos, U.S. District Court Cleveland
Judge K. O'Malley, U.S. District Court Cleveland
Magistrate Judge Perelman, U.S. District Court Cleveland
Lynne H. Buck, U. S. Attorney Cleveland
Nelson, Boggs, Norris, Circuit Judges, U. S. Court of Appeals Sixth Circuit, Cincinnati.

Petitioner

Jack Sharwell

TABLE OF CONTENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS
TABLE OF AUTHORITIES, STATUTES AND RULES

QUESTIONS PRESENTED I, II

LIST OF PARTIES III

TABLE OF CONTENTS IV

CONSTITUTIONAL AND STATUTORY PROVISIONS
TABLE OF AUTHORITIES, STATUTES AND RULES
V VI VII VIII

OPINIONS 1

JURISDICTION 2-12

STATEMENT OF CASE 13-26

REASON FOR GRANTING PETITION 27

CONCLUSION 28 – 29

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS TABLE OF AUTHORITIES, STATUTES AND RULES

U. S. Constitution App. N Amendments 1,4,5,6,8,14

Civil Rights 42 U. S. C. 1983 (Wrongful arrest)

Civil Rights actions F9. 26-12 (Improper investigation of crime). 29 U. S. C. 1331

Civil rights actions f9. 01-7 f9-26.12G. the procurement of groundless charges against the plaintiff based upon incomplete, unsupported evidence which the defendant knew or should have known was false, distorted or fabricated.

Appendix F - Modern Civil Rights Statutes 42 U. S. C. A.

1981 Equal rights under the law

1983 Deprivation of rights.

Civil Rights 1986 (Need to prevent).

International Disputes:

Internation dispute 8.03 2c, 8.03 2d FSIA-Foreign Sovereign Immunities Act 1976 doing away with immunity for commercial activity. Alleged crimes occurred before 1976 1.06 conclusion.

(2) Limitations on a Federal Court's power personal jurisdiction

(a) strategic consideration.

(b) Constitutional Considerations.

(c) Practical considerations.

Subject matter jurisdiction.

(a) Strategic Considerations.

(b) Federal Questions Jurisdiction.

(c) Practical considerations.

(d) International Comity as a limitation on the application of the United States Laws.

(e) Jurisdiction over suits against foreign

state.

17.6 Forum selection and choice of law clauses.

(a) Strategic consideration.

17.7 Venue.

(a) Strategic considerations.

17.9 (d) Exemptions to immunity.

(i) Commercial Activity.

(1) Requirement that the act be public and by persons with authority to exercise sovereign powers.

1.04 (2) (d) Expansive interpretations

(3) Federal question jurisdictions

1.05 (4) Jurisdiction over foreign sovereigns

1.06 Conclusions.

8.03 (2) (c)

8.03 (2) (d) Banking disputes

8.08 Counterclaims.

International disputes customary Inter-national law.

14.01 Sources of customary International law.

14.02 (3) (4)

Denied due process.

2. International dispute 8.03 2c, 8.03 2D FSIA-Foreign Sovereign Immunities Act 1976 doing away immunity for commercial activity. Alleged crimes occurred before 1976.

1.06 Conclusion.

Civil Rights 1986 (Need to prevent).

Civil Rights 42 U. S. C. 1983 (Wrongful arrest).

Civil Rights Actions F9. 26-12 (Improper investigation of crime).

29 U. S. C. 1331

International Disputes 17.2, 17.4 - CH 17

CONSTITUTIONAL AND STATUTORY PROVISIONS TABLE OF AUTHORITIES, STATUTES AND RULES

Pages

(2) Limitations on a federal Court's power 74

Personal Jurisdiction.

(a) Strategic Considerations. 85

(b) Constitutional Considerations 86, 87

(c) Practical Considerations 88, 89

Subject Matter Jurisdiction

(a) Strategic Considerations. 92

(b) Federal questions jurisdiction 93

(4) Practical considerations 102

(5) International COMITY as a limitation on the application of the United States Laws. 102, 103

(d) Jurisdiction over suits against foreign state 104

17.6 Forum Selection and choice of law clauses

(a) Strategic considerations 104, 105, 110, 111

17.7 Venue

(a) Strategic considerations 112

17.9 (d) Exemptions to immunity 122

(i) Commercial Activity 123

(1) Requirement that the act be public and by persons with authority to exercise sovereign powers 138

1.04 (2) (d) Expansive interpretations 1-50.2

(3) Federal questions jurisdiction 1-50.3

1.05 (4) Jurisdiction over foreign sovereigns 1-63,1-72

1.06 Conclusion 1-73

8.03 (2) (c) 8-64,8-65

8.08 Counterclaims 8-154

International Disputes Customary International

CONSTITUTIONAL AND STATUTORY PROVISIONS TABLE OF AUTHORITIES, STATUTES AND RULES

Law 14.2,14.3

14.01 Sources of customary international law

14.02 (3) (4) 14.26, 14.27

14.02 (3) (4)

Denied Due Process.

Civil Rights Actions F9.01-7 F9-26.12 G. The procurement of groundless charges against the plaintiff based upon incomplete, unsupported evidence which the defendant knew or should have known was false, distorted or fabricated.

Appendix F - Modern Civil Rights Statue 42 U. S. C. A.

1981. Equal rights under the law

1983. Deprivation of rights.

U.S. Constitution App. N Amendments 1, 4, 5, 6, 8, 14

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

Opinions

Federal Court cases.

The opinion of the United States court of appeals at Appendix A to the petition and is

Reported at Cincinnati, Ohio- Unpublished.

The Opinion of the United States district courts appears at Appendix B, C, D, E. Cleveland, Ohio and Los Angles.

JURISDICTION

The date on which the United States Court of Appeals decided my case was March 14, 2000.

No petition for rehearing was timely filed in my case.

INTERNATIONAL DISPUTES

(1) Requirement that the Act be Public and by the Persons with Authority to Exercise Sovereign Powers

In general, that act of state doctrine will not be applied unless the defendant asserting the doctrine can demonstrate that a "public" sovereign act has been performed by a person or persons with authority to exercise sovereign powers. The Supreme Court most recently discussed what kinds of conduct warrant application of the doctrine in Alfred Dunhill of London, Inc. v. Republic of Cuba. (15) In Dunhill, the Court ruled that the Cuban government's refusal to return funds that certain importers mistakenly made for cigars that they had purchased from expropriated Cuban cigar manufacturers did not constitute an act of state. The Court indicated that the proponent of the act of state doctrine was required to demonstrate a "public act" that was conducted by "those with authority to exercise sovereign powers." (16) Accordingly, the Court ruled that the Cuban government and the companies that it had named to possess the seized cigar business had failed to meet this burden because" [n}o statute decree, order, or resolution of the Cuban Government itself" had been offered in evidence to support their invocation of the act of state doctrine. (17)

Lower courts generally have followed Dunhill's requirement that the act of state involve "public" or sovereign" conduct by a foreign country. (18) As long as the act in questions was taken for a public purpose it

can be considered sovereign even though it may have affected commercial debt or obligations. (19) Similarly, courts have carefully considered

13. Sabbatino, 376 U. S. at 428, 84 S.Ct. at 940.

14. Id.

15. 425 U. S. 682, 96 S.Ct 1854, 48 L. Ed 2d 301 (1976).

16. Id at 694.96 S. Ct at 1861.

17. Id at 695.96 S. Ct at 1861.

18. See e.g. Republic of the Philippines v Marcos, 806 F. 2d 344, 358 (2d Cir. 1986)("Purely Private acts" of the former Philippines president are not protected), cert, denied, 480 U.S. 942, 107 S. ct 1597, 94 L. Ed 2d 784 (1987); Hunt v. Mobil Oil Corp., 550 F. 2d 68, 73 (2d Cir.) (expropriation of an act[] of the sovereign"), cert denied, 434 U.S. 984, 98 S.Ct 608, 54 l.Ed.2d 477 (1977): Eckert Intl, Inc v. Government of Fiji, 834 F. Supp. 167, 171 (E.D. Va. 1993) (Fiji's termination of a contract with a private consultant was a "private, rather than a public" act), aff'd 32 F.3d 77 (4th Cir. 1994) But see General Aircraft Corp. v. Air Am., Inc., 482 F. Supp.3, 6 (D.D.C.1979) (military procurement decision was an act of state); Bokkelen v. Grumman Aerospace Corp., 432 F.Supp. 329, 333 (E.D.N.Y.1977) (denial of an import license was an act of state).

19. Sec, e.g., Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F,2d 404, 408 (9th Cir. 1983) (an act granting a "concession to exploit natural resources" is an act that can only be taken by a government and that factor overrides the commercial implications), cert denied, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984); Braks

whether the individuals or entities performing the complained-of conduct had authority to act on behalf of the sovereign state, and have refused to apply the act

of state, and have refused to apply the act of state doctrine in cases where the defendants did not have, or did not act within the scope of, such authority. (20)

17.5 International Disputes

17.5 Subject Matter Jurisdiction

For a defendant in an international case, challenging subject matter jurisdiction is important. Where such a challenge is successful, the plaintiff will lose its choice of a federal procedure rules. In addition, a defendant may be able to prevent the application of United States substantive law an remedies to a transaction that principally occurred abroad.

Lack of subject matter jurisdiction is a defense; however, this defense cannot be waived by failure to include it in a motion or answer. The defense cannot be waived by failure to include it in a motion or answer. The absence of subject matter jurisdiction can be raised by a defendant or by the court at any time because it deprives the court of power to proceed. (2) A defendant should pursuant to FRCP 12(b)(1). However, where a defendant unsuccessfully challenges the extraterritorial application of United States law at the beginning of a case, "the issue of subject matter jurisdiction persists" and may be raised at a subsequent time based on more complete factual record. (3)

17.5

1. See FRCP 12 (h)(3).

2. See id.

3. See Leasco Data Processing Equip. Corp v, Maxwell. 468 F. 2d 1326, 1330 (2d Cir. 1972); see also Des Brisay v. Goldfield Corp., 549 F.2d 133, 136, (9th Cir.197; (quoting Leasco, 468 F.2d at 1330); Secur ties Exch. Comm'n v. Kasser, 548 F.2d s 1330), cert denied, 431 U.S. 938, 97 S.C 2649, 53 L. Ed.2 255 (1977).

A violation of international law in and of itself may not give rise to a cause of action absent some additional U. S. connection to the claim.

[5] International Law and Private Actions

Frequently, individuals private actions will not be subject to challenge as a violation of international law. (126) The courts generally believe that there is a lack of international consensus regarding liability for purely private actions. (127) The potential degree of private liability may vary with the claimed offense. As an example, purely private acts of privacy or slavery may violate international law. (126) For the present at least, tortured-based claims against persons who are not as yet acting under the color of state authority will likely not be viewed as violations of international law. (129)

in this area is lacking. 726 F. 2d at 794. See Forti v. Suarez-Mason, 672 F. Supp 1531, 1541 (N.D. Cal. 1987)

(126) Tel-Oren v. Libyan Arab Republic, 726 F.2d at 794 (opinion of J. Edwards). De Sanchez v. Banco Central de Nicaragua, 770 F. 2d 1385, 1397 (5th Cir. 1985). (129)Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994)
an actionable cause for violation of international norms such that are "specific, universal, and obligatory." In re Estate of Ferdinand Marcos, Human rights Litigation, 25 F. 2d 1467, 1475 (9th Cir. 1994)

(125) Thus aliens may be able to sue a foreign person in tort for violation of international law under the Alien Tort Act, but it is possible that the U.S. person may be denied this right. The Alien Tort Act specifically grants aliens a right to sue a foreign person for violation of international law, the U. S. person may have to find some other domestic authority that would permit suit for

the purely international law claim. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779-80 n.4 (D.C. Cir 1984) (opinion of J. Edwards).

On the other hand, hand "International law is part of our law, and must be ascertained and administered by the courts of justice appropriate jurisdiction. " The Paquette Habana, 175 U.S. at 700, 20 S.Ct at 299 The Alien Tort Act is essentially a jurisdiction statue. If international law is incorporated into U. S. law then a U.S. person should be able to bring a claim for violation of international law, that provided that the claimant can also establish jurisdiction in the court.

(126) Sanchez-Espinoza v. Regan, 770 F. 2d 774, 776, 792 (opinion of J. Edwards). International law, as its name suggests, deals with relations between sovereign states, not between states and individuals....Injuries to individuals have been cognizable only where they implicate two or more nations; If one state injures the national of another state, then this can give rise to a violation of international law, since the individual's injury is viewed as an injury to his state. As long as a nation injures only its own nationals, however, then no other state's interest is involved; the jury is purely domestic affair, to be resolved within the confines of the nation itself. DeSanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1396 (5th Cir. 1985). The deSanchez court did not concede that individuals might be able to sue their state under international law for violations of certain fundamental human rights. 770 F.2d at 1937.

(127) Private liability for actions under the color of the state law has been traced to Nuremberg. Tel Oren v. Libyan Arab Republic . 726 F. 2d 724, 793 D.C. Cir 1984) (opinion of J. Edwards). But although the commentators and courts have urged or toyed with

extending private liability to purely private acts, international consensus
803[2][c] International Disputes
the United States. Under such circumstances, the Port Authority becomes subject to the jurisdiction of the U.S. court. The court of appeals reversed the district court insofar as the district court had held the Somali Democratic Republic was immune from suit. The curt of appeals determined that the Somali embassy had acted like a collection agent and consequently had engaged in commercial activity. 121) In upholding the district court's determination that the commercial exception applied to the Sipping Agency the court referred both the payment in the United States and the foresee ability of injury to the U.S. Plaintiff. (121.2)

A third case illustrates the alternative rule to the direct effect test: the test of U.S. commercial activity.

The Gemini case discussed previously involved the Public Law 480 agriculture purchase program permitting foreign governments to acquire U.S. agricultural Products. In another disputes adding from the same program, the government of Egypt was sued in a cross claim for wrongfully delaying the unloading of the ship carrying the grain it had purchased under the program. The second Circuit, relying on Gemini, determined that the dispute fell within the commercial exception for conducting commercial activity within the United States. (122)

The Egyptian ministry sought to avoid the exception as applied in Gemini by arguing that the party advancing the claim was not the person with whom it contracted but another character who suffered loss on account of the delay in getting the ship from Egypt's charter. The court did not find this distinction relevant for the distinguishing, from the standpoint of soverign immunity under the FSIA, between a claim

based on such a guarantee and a claim for a breach of the duty promptly to discharge the ship.." (122)

The determinative feature in Ministry of Supply was court determination that the sovereign had engaged in commercial activity within the United States by reason of its arrangements to.

121.1 TransAmerican Corp. v. Somali Democratic Republic. 767 F.2d998.10 (D.C. Cir. 1985)

121.2 767 F.2d at 1004.

122 Ministry of Supply, Cairo v. Universe Tankships. Inc. 708 F.2d 80(id 0 1983).

123 Id. at 85.

[d] Expensive Interpretations

Various lower courts have used the Burger King analysis to expand or limit their jurisdictional reach. (248) In Sea Lift, Inc A Refinadora Costarricense de Petroleo, S.A. (249) a Florida salvage company sued a Costa Rican barge owner for breach of contract. The court, in its minimum contracts analysis, evaluated the circumstances surrounding the negotiations of the contract. Upon finding the defendant never conducted any business in Florida (although it had sent an agent there to solicit the contract), that no significant negotiation of important contract terms had occurred in Florida, and that English law applied in dispute resolution under the terms of the contract, the court said that the conduct did not rise to the level of purposeful availment. Even though the contract required payment in U.S. dollars in Florida, the court said the contract was a one-shot deal that contemplates no ongoing relationship between the parties, and hence assertion of jurisdiction would be improper.

[3] Federal Questions Jurisdiction

The existence of a federal statue will give a federal court subject matter jurisdiction. However, unless the applicable statute specifically provides for personal jurisdiction, venue limitation or expansion, exercise of personal jurisdiction will be based upon federal rules the forum state's long arm statute. However, the exercise of federal questions jurisdiction must still comport with due process.

(250) 647 F Supp. 600 (M.D. Tenn 1986)

(Release #8, 4/95) 1-50.3

[4] Jurisdiction over Foreign Sovereigns

Since 1976 Suits against foreign sovereigns have been controlled by the Foreign Sovereigns Immunities act (FSIA). (342) The FSIA codifies the restrictive theory of sovereign immunity, doing away with immunity for the commercial activities of foreign sovereigns. (343) Under the FSLA, personal jurisdiction is granted over foreign states, where there is no immunity and where service is made as directed under the act. (344)

(1) Commercial Activity

The most important exception to immunity under the FSIA arises from commercial activity. This exception subjects a foreign state to suit where a claim is based upon (i) a foreign sovereign's commercial activity in the United States, (ii) acts in the United States in connection with commercial activity elsewhere, or (iii) commercial activity outside the United States that has a direct effect in the United States. (33)

The commercial activity must have been undertaken either by the foreign sovereign itself or by an agent of the state who acted with actual authority.

(34) It must also be the type of activity in which private individuals could engage; purely public or sovereign acts are not considered commercial. (35) In determining whether an act is commercial courts focus on the nature of the activity rather than the purpose of the activity, (36) i.e., "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce" (137) Thus, the

1.06 Conclusion

As the preceding discussion shows, jurisdiction over foreign sovereigns is statutorily determined by the application of the Foreign Sovereign Immunities Act. The exercise of personal jurisdiction over an alien corporation. When jurisdiction is premised in federal courts on a legal questions, some courts have used a "national contracts" test to exercise jurisdiction when the forum states, long arm statue does not provide for jurisdiction over the defendant. (456) A few commentators have also supported this theory. (426) Counsel should advise his client that neither Congress nor the Supreme Court has yet legitimated this approach

(425) Id. The Court also dismissed respondents claim that the United States waived its immunity by signing 1605(a)(1). The Court found that there cannot be a waiver of immunity to suit in United States courts or even the availability of a cause of action in United States where there is no mention of a waiver in the international agreement. Finally, the Court dismissed the argument advanced by respondents that the treaty of friendship, Commerce and Navigation. Aug. 8, 1938, United States-Liberia, 54 Stat. 1739 T.S. No. 956 carves out an exception to the FSLA. The Court found

that Art. I of the treaty provides in the pertinent part that the nationals of the United States and Liberia "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." The FSLA, the court found, is clearly one of the "local laws" to which respondents must "conform" before bringing suit in United States courts.

Sovereign Immunity 8.03[2][d]

Acquire wheat and to ship it to Egypt (124) The fact that the sovereign was not in privity of contract with the injured party became irrelevant as the claim was based upon that commercial activity. The Court did not have to find a direct effect once the U. S. commercial activity was established. (124.1)

Therefore, results such as Brazorport and Maritme International. Where lack of contractual privity was apparently determinative. were avoided in Ministry of supply since the court did not have to rely upon the direct effect exception.

The case discussed above, for the most part involved some kind of contractual dispute involving shipment-the contract was either breached or negligently performed. If a U.S. plaintiff was injured on account of the breach of a commercial contract and the injury to the U. S. plaintiff, if the breach arose from a commercial activity carried on in the United States, then the commercial exception will apply as well prior to Argentina C. Weltover. The Commercial exception generally would apply if the U. S. plaintiff were injured by noncommercial acts outside of the United States were not foreseeable. Neither would the commercial exception apply to a dispute between foreign parties involving activities only incidentally touching upon the United States.

[d] Banking Disputes

Although disputes regarding shipment of goods arise frequently the court will obviously face different factual circumstances. Disputes over banking arrangements are becoming quite common. The same principles of contractual nexus applicable in the shipment of goods cases apply in the banking cases as well.

(136) The course of commercial conduct engaged in by the sovereign of the United States encompassed not just the purchase of the wheat but also the assigned arrangement for it carriage to Egypt.

(124.1) See also Barkanic v. General Administration of Civil Aviation of the people's Republic of China, 822 F2d 11 2d Cir 1987 of ticket facilities and flights between U. S. and China was U. S. Commercial activity within exception to immunity even though injury arose from crash of domestic flight
Release #8, 4/95) 8-65

67. See id.; see also United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997) (rejecting foreign defendant's comity-based argument as to criminal prosecution for alleged antitrust violations where defendant's alleged conduct was illegal under both Japanese and United States laws), cert denied, __U.S.___118 S. Ct 685, 139 L.Ed. 2d 632 (1996).

STATEMENT OF THE CASE

Denied due process.

There is no loss, there is no criminal act.

Grand jury dismissed criminal activity in Count One, I plead guilty to a non-charge.

Judge K. O'Malley ruled against the evidence and granted summary judgment. Dismissal

U. S. District Court and appellate Court Sixth District refuses to recognize Judge Manos, error in not reading the indictment canceling criminal activity in Count One.

I had never advertised, bought, sold, shipped chemicals or plastic resins; there was no criminal intent or motive.

Judge Manos' U. S. District Court, lacked jurisdiction over a commercial shipment 1973 to Taiwan, China.

J. Sharwell had immunity until 1976 when the Government eliminated immunity for commercial transactions.

Unfair Court procedure holding Pro Se Litigant the same standards as attorneys.

Cases dismissed without valid reasons.

Government had two defenses - J. Sharwell did not state a claim. As a Pro Se litigant, my lawsuit for illegal prosecution is my claim; relief can be granted to Appellees when they pay the ten million dollars.

Appellant believes that common law, common sense, U. S. citizens would deny second defense, two year tort statue of limitations (illegal prosecution, illegal imprisonment).

F. B. I. fabricated evidence causing three count indictment.

Jurisdiction CR 76 1368, Cr 76 389- 1973 commercial transaction in Taiwan, China. This Country

is not recognized by the U. S. A..

(b) Constitutional considerations - CH 17-17.4. Constitutional Considerations

Weather personal jurisdiction is based on a state long-arm statute 1 stature, a federal court can only exercise personal jurisdiction meant with the due process requirements of the Fifth or Fourtee bent to the Constitution. See Chapter 2 "Personal Jurisdiction vice," supra, for a detailed discussion of personal jurisdiction statutory and constitutional analysis that determines whether the court can exercise personal jurisdiction applies to domestic and a defendant a like. However, the Supreme Court has cautioned with great care and reserve should be exercised when extension out of personal jurisdiction into the international field.'" (4)

Sashi Metal Industry Co., Ltd. v Superior Court, (5) the Supreme Court emphasized the sensitivity of applying United States Long Arm.

See FRCP 12 (b)(2); Chapter 2 "Jurisdiction and Service, " supporting the procedure for raising objective personal jurisdiction generally. The jurisdiction has the burden of the facts necessary to support jury a preponderance of the evidence. Lucas v. Gulf & Western Industry F2d 800, 805 (3rd Cir. 1981); A. E. I Du Pont De Nemours Supp. 227 236 D. Del 1984).

F R C P 12 (b) (2) CH 2 - Jurisdiction it is the U. S. Government's burden of proving the facts necessary to support jurisdiction by a preponderance of the evidence.

J. Sharwell states no evidence was produced.

Original indictment was One Count, one container of wastepaper, a commercial transaction to Taiwan. F. B. I. interrogated Spencer Sharwell, presented false evidence to U. S. Attorney Keller causing Three Count indictment.

Appellant states indictment originated due to L/C being opened to Taiwan Bank for Taiwan customer, a commercial transaction. Taiwan Government filled an action against Tommy Huang dba Boom Worldwide, alleged fraud due to mix-up of one container wastepaper shipment. I was the shipper. I was not named in the Taiwan action; Taiwan lacked jurisdiction over a commercial transaction. U. S. Attorney Keller states "Taiwan in the Republic of China" indictment page two. Plaintiff further states William Keller knowingly used false testimony obtained by scare tactics, trickery and the investigating resources of the F. B. I. in a private investigation of S. Sharwell due to National City Bank, L. A. complaint

Defendants Keller and Berkowitz have violated my constitutional and civil rights. Berkowitz has given perjured testimony when testifying January 14, 1977 page four, lines fifteen-sixteen, there is no physical evidence, complete misrepresentation, page five lines seven through eleven there is no physical evidence, complete misrepresentation. defendants Keller and Berkowitz are guilty of un-professionalism, prosecutorial misconduct and improper judicial behavior.

Plaintiff, Jack Sharwell, further states that the U. S. Government filed a criminal complaint against plaintiff violating his civil rights; knowing the government lacked jurisdiction of possible commercial crime in China.

The Grand jury deleted the last paragraph in count one knowing that the U. S. Government lacked jurisdiction to enforce Chinese law, U. S. Department of Justice, The F. B. I., The Judicial system knew that they did not have jurisdiction.

The U. S. Government did not recognize China. Plaintiff States the other contents of count one is

normal business procedure and communication.

Plaintiff further states that he agreed to plead guilty to count one. The alleged criminal activity in the count one did not exist due to the Grand Jury deleting the last paragraph of cont one. This is clearly stated on the indictment on page one eight, top paragraph, and repeated again top paragraph, page nine. In other words, I plead to a non- charge and spent time in prison because of a non-charge.

Counts two and three were dismissed.3 There is no criminal act since there was no loss.

Everything alleged in count one is normal business conduct or normal business activity.

Plaintiff states the F. B. I. investigated branch hid evidence that would have helped the defense. The F. B. I. by not prosecuting Spencer Sharwell and not producing his interrogation caused an indictment against plaintiff containing one hundred false evidence. Plaintiff further states that the counts of the indictment counts one and count three having no connection to plaintiff. The F. B. I. caused plaintiff to go out of business, lose all of his money, and stopped him of taking care of his wife and children. The F. B. I. knew Spencer Sharwell requested my signature, when he was working for me in California. This letter gave Spencer Sharwell permission to use my name on future shipments. No intent, motive, no physical or monetary loss occurred an the U. S. A. No shipments were made using my name or any affiliates. Appellant states First National City Bank, L.A. is responsible for this indictment, causing me to be incarcerated, causing me to lose my business, my income, and putting me, my wife and children in harms way.3 Plaintiff further states that Judge John Manos insisted I read count one of the indictment and he kept pushing me to read count one as evidenced by transcript of proceedings December

16, 1976. Judge Manos failed to follow Federal Policy or Federal Law. There appears to be impropriety among Federal employees and Federal Judges.

Plaintiff further states there is a failure to produce proper documentation and to insure the integrity of Federal Court. It is the Courts responsibility to produce evidence.

No evidence was produced only allegations.

In Cleveland trial my Consul Morris Blane is now deceased if he had read this indictment, he would not have me plea to something that was not a charge; and further if the prosecutor had read the indictment he would have dismissed the case.

This matter should have been a civil action, so I would have had a right to file a cross-claim for my $55,000.00 container.

I had no money to pay an attorney and I plead guilty to one count instead of three, meaning maximum time spent in prison was five instead of fifteen years.

Now I find out twenty-two years later by reading the U. S. District Court - Central District of California, September 1976 Grand Jury CR 76 1368 and Cleveland Case CR 76 389 that I plead guilty in Cleveland, Ohio to one count that contained no criminal act.

Count one last paragraph deleted by the Grand Jury hereby "Realleges and incorporate all of the allegations set forth herein". Since the Grand Jury deleted the last paragraph, they deleted the criminal charges.

My guilty plea December 16, 1976, page eight, line thirteen through twenty-four, page nine, lines one through nineteen, has no connection to the indictment count one.

Plaintiff, J. Sharwell, states that the presiding Judge, John Manos, illegally sentenced him five years

in Federal Prison of which he served a maximum of forty months. Where no criminal activity existed.

Plaintiff states he plead guilty to count pne of an indictment of Grand Jury Charges. Counts two and three were dismissed. No Physical evidence was produced.

Plaintiff states Judge John Manos did not read the indictment count one and sentenced me to prison.

The Grand Jury Criminal charges in count one were deleted when the Grand Jury deleted the last paragraph of count one. This is clearly stated on the top of page eight, first paragraph and again on page nine first paragraph.

Plaintiff, J. Sharwell, states the indictment was not read to me and therefore, I did not realize that the plea to count two was a plea to an allegation in count one that had been deleted. I never collected $185,000.00 or $140,000.00.

No wonder I did not understand the indictment, I was charged improperly causing me to go to prison. I plead guilty to a charge that was deleted by the Grand Jury and spent Jail time. Believe me, I do not want to hear a typographical error for forty months maximum on a five year sentence.

You can tell what happened in Judge Manos's Courtroom that I did not know what was going on when I plead guilty, and neither did Judge Manos who accepted my plea.

No U. S. citizen or company lost any money. What happened to the protection I am suppose to receive from my government?

Why shouldn't a U. S. prosecutor who is lying in court be prosecuted for perjury?

The following statement made by Judge John Manos is laughable "The Court makes up it own mind based on all the facts". Transcripts of proceedings

January 17, 1977, lines thirteen-fourteen.

There was one shipment involved, one complaint from over-seas from Tatung Co., who kept my container with a $55,000.00 cargo that was destined for another customer. This was not count one.

Count three- Maeda Ind. Co. opened an L/C _ all buyers open L/C's. They made no complaint. Explain?

I contacted an attorney in L. A., Mr. Sheridan, and he is the only attorney who came up with a defense. He said "Give me a plane ticket and expenses so I can check this shipment". I didn't have any money so I was forced to plead guilty to one count of a shipping container that had wastepaper product that was different than the wastepaper product that was purchased.

Since when does the U. S. Government represent Taiwan Co. against a U. S. Citizen.

If I had the money the government spent on this complaint the inequality in the U. S. Court system would be challenged. This violates the sixth amendment right to trial. What happened to equal rights?

PROSECUTORIAL MISCONDUCT

Paresco was a company paid to inspect cargo. Why is the Government alleging criminal activity and not indicting Paresco.

I repeat I have never purchased or sold plastic resins. Evidence by exhibit

This Information was forwarded to the U. S. Attorney's Office, Washington, D. C., and no other answer has been received.

It has taken me twenty-three years to ask myself why I was in prison - California prosecutor said I received $1,000,030.00; If this is a fact, $10,000.00 was a small bail amount. Appellantt was shipping

approximately eight to ten containers of wastepaper monthly ($500,000.00). Time frame of shipments U. S. East Coast to far east - average 40 days.

If my intentions or motive was to steal money, I could have three quarters of a million or more in forty days. There was a one container mix-up; final result would be one company got the wrong shipment out of ten to fifteen containers shipped in a forty day period. The company receiving the wrong container, received a container with my $55,000.00 cargo in error, Tatung Co. Government lawsuit stopped me from making a counter-claim. The Company receiving the mixed-up container benefited. I shipped wastepaper products.

I shipped wastepaper products.

No U. S. Citizen or company lost any money.

The Government is suppose to protect U. S. citizens not prosecute them.

Spencer Sharwell owner of Marbon Dist. went broke, asked for a job, worked for me less then three weeks. F. B. I. interrogation took place, L. A. indictment was immediate.

Marbon Dist. Advertised, brought, sold, and shipped plastic resins and chemicals. After F. B. I. interrogation, Spenceer Sharwell never returned to L. A. .

I had two scrap yards that were run by two capable people both graduate engineers- when a container of wastepaper was ready for shipment, they forwarded it to the proper steamship company for delivery, informed the office who did the documentation that was presented to the bank for payment against L/C,

There was a mixed-up shipment Count Two of Indictment, one Container went to Tatung Co. of Taipei who opened a L/C amount of $140,000.00 thru Hua Na Commercial Bank. Taipei who transferred the L/C to

Bank of America, L. A., who would pay against shipment after documents were forwarded to Taipei Bank for approval before payment. The shipment amount was about $100,000.00 (one container). The container they received had a value of about $55,000.00, leaving a difference of about $45,000.00 - I was never able to find out what happened to this $55,000.00 shipment or the $100,000.00 shipment because of indictments against Boom World, who acted as agent of this shipment. Who received the $100,000.00 ? Did Tatung Co. find out who had the missing shipment?

Half of the total shipments were purchased from U. S. Government. No wonder I did not understand the indictment I was charged improperly causing me to go to jail. I plead guilty to a charge that was deleted by the Grand Jury and spent jail time. Believe me I do not want to hear typographical error for forty months maximum on a five year sentence.

This indicment was not read to me, I assumed I was pleading guilty to count two, and I was told to plead guilty to count one where the intent, motive, criminal activities had been deleted by the Grand Jury. It appears the U. S. Government was representing the Chinese Government. Who received the container that was destroyed for TaTung Co.? Count three must be a typographical error, there is no complaint. This should have been a Civil Action or it should have settled between the buyer and seller.

Judge O'Malley starts with "plaintiff Pro Se Jack Sharwell, brings this action against defendants U. S. of America, and its various department and officials, alleging illegal prosecution stemming from plaintiff's guilty plea to wire fraud". This is an improper statement. Judge O'Malley has deliberately left out Judge Manos's mistake in accepting my guilty plea for

a $185,000.00 shipment, last paragraph count one deleted by Grand Jury. This appears to be Government impropriety. Guilty plea, transcript of trial page 8 - lines 13-25, page 9 - lines 1-19 December 16, 1976.

Appellant states the Grand Jury dismissed the alleged crimes Appellant states Judge O'Malley has made another improper statement appellant filled Motion for Discovery March 18, 1999 not May 18, 1999; appellant was denied Discovery.

Assistant U. S. Attorney Lynne H. Buck filed Federal Defendant to stay Discovery May 11, 1999. Judge O'Malley, May 13, 1999, granted Defendant's Motion to stay Discovery: time frame for U. S. Attorney's motion two days. Appellant states he received Judge O'Malley's decision May 15, 1999 and filed a response to defendant's motion after going to records office, U. S. District Court Building. Judge O'Malley's response to my motion for Discovery March 18, 1999; time frame 56 days; Discovery denied. Appellant states FTCA claim has no merit and does not apply to illegal prosecution caused by international dispute of a commercial case. Illegal prosecution did occur. F. B. I. interrogation of Spencer Sharwell will prove that the interrogation is the same as the indictment. The original case CR 76 - 389 falls under International Disputes foreign immunities 8.03 2 D and banking disputes. U. S. Government has jurisdiction over commercial cases starting 1976 not 1973.

Appellant states prosecutor selected count one, when count two is where complaint originated, one mixed-up container shipment which could have been a Civil Action or settled with negotiation.

Judge Manos's Court withheld evidence "other circumstances" as evidenced by exhibit.

Front page of indictment states appellant is

owner and operator of Marbon Dist.; Spencer Sharwell is owner and operator of Marbon Dist.

Appellant states he had no financial transaction with Spencer Sharwell or Marbon Dist.

Appellant states shipments in Count One originated with Jack Sharwell or JS International for plastic resins or chemicals. This is not a fact. Appellant states he never advertised, bought, sold, or shipped plastic resins or chemicals during his life time, further, Marbon Dist. Inc. listed on front page of indictment had no connection to appellant, financial or otherwise. All L/C's opened 1973 to 1975 to Jack Sharwell or JS International or any affiliated companies received their merchandise. There were no complaints filed. (Exception - a one container mix - up).

Appellant contacted New York Division - Bureau of Corp. July 8, 1999, and received the following information. Marbon Dist. Inc, opened November 15, 1973 dissolved March 27, 1979, owned and operated by Spencer Sharwell, Count two ship date December 1973.

The only correct charge in the indictment was count a commercial business dispute that occurred December 12, 1973. This shipment was made by JS International.

If appellant owned Marbon Dist. as the front page of indictment states, which was false - appellant became aware after Judge O'Malley's dismissal order.

Spencer Sharwell would not have required a letter authorizing JS International as a shipper of plastic resins or chemicals. This letter originated a few days before F. B. I. interrogation of Spencer Sharwell - the request for this letter was a planned attempt to misrepresent the facts by the F. B. I. and Spencer Sharwell. F. B. I. knowingly turned false evidence to L. A. District attorney Wm, Keller who submitted the

charges to the Grand Jury who returned a three count indictment with false and tainted evidence.

Judge Manos's Court withheld evidence "other circumstances" as evidenced by exhibit; denying me probable minimum security.

Appellant states as to Administrative Appeal, my position is that a number of parties involved acted without authority and discretion, and therefore, I am not bound by Administrative appeal.

U. S. Government knew they lacked jurisdiction in a commercial case, in order to placate the bank's complaint; this criminal action went forward.

The U. S. Government did not have jurisdiction over Case nos. CR76-389 or Cr76-1368. The U. S. Government did not recognize Taiwan, China; had no treaty or agreement with China covering commercial activity.

d. Expensive interpretation - assertion of jurisdiction would be improper.

[d] Expensive Interpretation

Various lower courts have used the Burger King analysis to expand or limit their jurisdictional reach (245) In Sea Lift, Inc. v Refinadora Costarricense de petroleo, S. A. (246) a Florida salvage company sued a Costa Rican Barge owner for breach of contract. The Court, in its minimum contracts analysis, evaluated the circumstances surrounding the negotiation of the contract. Upon finding the defense never conducted business in Florida (although it had sent an agent there to solicit the contract), That no significant negotiation of important contract terms had occurred in Florida, and that English law applied in dispute resolution under the terms of the contract, the court said that the conduct did not rise to the level of purposeful availment. Even though the contract required payment in U. S. dollars in Florida, the court said the contract was a one shot deal

that contemplated np ongoing relationship between the parties, and hence assertion of jurisdiction would be improper.

Time for Government's acceptance of responsibility for lack of jurisdiction in case Nos. CR76-1368, CR76-389; in admitting jurisdiction in case No. 99CV 636 Illegal Prosecution were Civil Rights and Constitutional Law should prevail; not be overlooked.

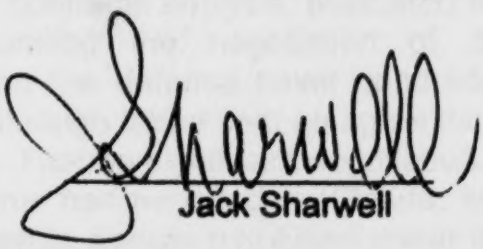
It appears that this Pro Se litigant is stupid - over a million dollars in shipments completed from 1973 through 1975; and no money was lost.

AFFIDAVIT

Here comes Jack Sharwell, Who being duly sworn, states his oath.

1. Appellant, Jack Sharwell, states a lack of knowledge to existence of Marbon Dist. Inc. prior to telephone conversation with Spencer Sharwell, who informed appellant that he was in financial trouble, and wanted help.
2. I offered him a job, he accepted for the sole purpose of obtaining a letter authorizing J. S. International to replace Marbon Dist. Inc. as shipper of plastic resins and chemicals.
3. No shipments were ever made by Jack Sharwell, J. S. International or any affiliated companies.
4. Jack Sharwell has never advertised, bought. sold, or shipped chemicals or plastic resins.
5. This letter of authorization was given to Spencer Sharwell one week prior to F. B. I. interrogation of Spencer Sharwell.
6. Jack Sharwell states no monies, assets or financial help was given or exchanged between Jack Sharwell, his affiliates, to Spencer Sharwell or his affiliated companies.

Sworn to me and subscribed before me this 26 day of July 2000.



Jack Sharwell

Kay Payton
Notary Public, State of Ohio
My Commission Expires Dec. 21, 2003

REASON FOR GRANTING THE PETITION

U. S. Government Refusal to defend against illegal prosecution and illegal imprisonment.

Denied Court of International Trade, Special Courts, Separate Courts.

U. S. District Court and appellate Court improper dismissal of case overlooking International Disputes Laws.

Imposing two year tort statue limitation dismissing case for Government illegal prosecution, illegal imprisonment.

U. S. Government refusal to correct.

Judge John Manos failure to read indictment causing illegal imprisonment.

New evidence presented showing Grand Jury dismissal of Criminal acts.

Accepting F. B. I. fabricated allegations causing three count Indictment to placate National City Bank, L. A. complaint.

U. S. Attorney Keller did not present evidence that is a requirement.

Making victim of Jack Sharwell and his family.

Sentencing Jack Sharwell to prison where all criminal activity was dismissed by Grand Jury.

Improper Court case, no criminal act, no loss in U. S. A., (physical or monetary).

Court looked the other way.

U. S. Government lacked jurisdiction for commercial transaction - 1973 - Taiwan, China.

Jack Sharwell had immunity for commercial transaction until 1976.

U. S. Government denied Constitutional protections.

Judge Manos refused to correct his error. knowing he could not be prosecuted

Conclusion

The U. S. Government did not recognize China. Plaintiff States the other contents of count one is normal business procedure and communication.

Plaintiff further states that he agreed to plead guilty to count one. The alleged criminal activity in the count one did not exist due to the Grand Jury deleting the last paragraph of count one. This is clearly stated in the indictment page eight, top paragraph, and repeated again top paragraph, page nine. In other words, I plead to a non- charge and spent time in prison because of a non-charge (40Months). There is nothing in count one applicable to appellant, I did not advertise, buy, sell or ship plastic resins or chemicals during my life time. F. B. I. knowingly presented false testimony to U. S. attorney Los Angles who knowingly presented false testimony to the Los Angeles Grand Jury by naming appellant as owner operator of Marbon Distributor appellant had no affiliation with this corporation.

U. S. Government Lacked Jurisdiction. Over commercial transactions prior to 1976. Appellant had immunity over a 1973 commercial transaction.

Judge Manos did not read the Indictment causing illegal prosecution, illegal sentencing to prison where no criminal intent, motive or loss occurred. In addition First National City Bank L. A. does not exist.

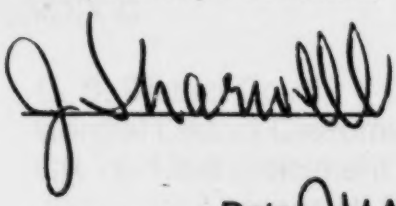
Judge O'Malley U. S. District court, Judges, Nelson, Boggs, Norris, U. S. Court of appeals 6th District looked the other way and did not defend against my complaint of illegal prosecution, illegal imprisonment; in addition the courts discriminated against a Pro Se litigant. By holding him to the same or tougher standards than attorneys by accepting Judge Manos illegal prosecution, illegal sentencing, and

improper procedure where no crime was committed, no evidence produced.

U. S. Government is a responsible party who made victim of appellant and family and must pay restitution.

The Petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: June 14, 2000

INDEX TO APPENDICES

APPENDIX A

United States Court of Appeals Sixth Circuit order filed March 14, 2000 PGS. 1,2,3

APPENDIX B

Judge O'Malley U. S. District Court Memorandum and order filled June 30, 1999 PGS. 1-6

APPENDIX C

U. S. District Court PGS. 1-9
Central District California
CR 76-1368 Indictment filed November 10, 1976
Judge John Manos U. S. Court CR 76-389
November 19, 1976

APPENDIX D – PGS. 1-17
Transcript of trial December 16, 1976,
January 14, 1977

APPENDIX E – PGS. 1-4
Other Circumstances

APPENDIX

A

No. 99-3882

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK SHARWELL	)	FILED
	)	MARCH 14 2000
Plaintiff Appellant,	)	LEONARD GREEN
	)	CLERK
v	)	
UNITED STATES OF	)	
AMERICA; US	)	
ATTORNEY GENERAL;	)	ORDER
UNITED STATES	)	
ATTORNEY,	)	
	)	
Defendants-Appellees	)	
	)	

Before NELSON, BOGGS, and NORRIS, Circuit Judges.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation to specific situations. Please see rule 28 (g) before citing in a proceeding in a court on the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Jack Sharwell appeals a district court order dismissing his complaint filed pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. } 1346, and the doctrine announced in Bivens v. Six Unknown Named

Agents of Fed. Bureau if Narcotics, 403 U.S. 388 (1971). The case has been referred to a panel of the court pursuant to the Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, to this panel unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a).

Seeking monetary relief, Sharwell sued the United States, Attorney General, and a United States Attorney, alleging that his 1976 conviction for wire fraud was a result of malicious prosecution and violations of his constitutional rights. The district court determined that Sharwell had not presented his claims to the appropriate federal agencies and that his claims were barred by applicable statutes of limitations. Consequently, the court dismissed the complaint for failure to state a claim. Sharwell has filled a timely appeal.

Upon review, we concluded that the district court properly dismissed Sharwell's complaint for failure to state a claim. This court renders de novo review of a district court's dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6). See Tucker v. Ohio Dep't of Rehabilitation and Corrections, 157 F.3d 453, (6th Cir. 1998). The court must construe the complaint in the light most favorable to the plaintiff, accept his factual allegations as true, and determined whether he can prove any set of facts in support of his claims that would entitle him to relief. See id.

Sharwell's claim are precluded by applicable statues of limitations. Sharwell asserts that his 1976 wire fraud conviction resulted from malicious prosecution by the United States Attorney and district court's improper acceptance of his guilty plea. However, Sharwell does not rely upon any newly discovered evidence as the basis for his claims. Rather, it is clear that all of the facts underlying his

claims were available to him after his sentencing in 1977. Therefore, the statue of limitations began to run at that time because Sharwell should have been aware of his claims; see Collyer v. Darling, 98F.3d211,220 (6th Cir. 1996), and he had two years from that date to bring his FTCA claim. See Huffman v. United States, 82F.3d703, 705 (6th Cir. 1996). Sharwell also had two years from that time to bring his bivens claim. See Kurinsky v. United States, 33F.3d 594, 599 (6th Cir. 1994). Since Sharwell did not file his complaint until March 1999, his claims are untimely.

Accordingly, this court affirms the district court's judgment. See Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

APPENDIX

B

FILED
99 JUN 30 AM 9:40
CLEVELAND, OHIO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACK SHARWELL	:CASES NO. 1:99 CV636
Plaintiff,)	:
	:JUDGE O'MALLEY
v	:
UNITED STATES OF AMERICA, ET. AL,	:MEMORANDUM & ORDER
Defendants	:

Plaintiff pro se, Jack Sharwell, brings this action against Defendants United States of America and its various departments and officials, alleging "illegal" prosecution stemming from Plaintiff's 1976 guilty plea to wire fraud. Sharwell seeks $10,000,000.00 in damages against defendants as of his forty-month imprisonment. Defendants now moves to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) on the grounds that this claim upon which relief can be granted. For the reasons that follow, defendants' motion is GRANTED. This action is DISMISSED.

I. Background

On March 18, 1999, Jack Sharwell filed a complaint against the United States Government, the U, S. Attorney General, and the U. S. Attorney, alleging that his 1976 wire fraud indictment and December 16, 1976 guilty plea were tainted by prosecutorial and

judicial misconduct on the part of William Keller, former Central District of California U. S. Attorney, Herbert Berkowitz, former Assistant U. S. Attorney for the Northern District of Ohio, and the United States District Judge John Manos (Complaint PP3-4) 1. Additionally, Sharwell contends that the Federal Bureau of Investigation (FBI) hid evidence that would have aided the defense, and that the plaintiff only pleaded guilty to Count 1 of an indictment which was deleted by the Grand Jury (Complaint pp 8-9, 12).

More than twenty years after the alleged violations, Sharwell now brings this action for "Illegal" Prosecution and seeks $10,000,000.00 in damages resulting from his incarceration. Sharwell also filled a Motion for Discovery on May 18, 1999. In response, defendants filled a Motion to Stay Discovery pending the resolution of the present Motion to Dismiss. The Court granted the Motion to Stay on May 13, 1999, and now considers the defendants' Motion to Dismiss pursuant to Federal Rules of Civil Procedures 12(b)(1) and (6).

II. Law and Analysis

The United States is immune from suit except in those specific instances where it waives its immunity and defines for itself a limited jurisdiction by which claimants may sue. United States v. Testen, 424 U. S. 392 (1976); United States v. Sherwood, 312 U.S. 584 (1941). With respect to claims that allege tortious activity by federal employees, the provision of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 2671 et seq., govern and define a court's jurisdiction. (2)

Defendants posit several reasons under the FTCA why Sharwell's claim for malicious prosecution should be dismissed, particularly failure to exhaust administrative remedies, application of statutory time

bar, and government immunity. First, the FTCA prohibits suits in tort against federal employees "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency. " 28 U.S.C. 2675 (a). Second, FTCA claims must also be received by the appropriate federal agency within two years of the incident giving rise to the claim. 28 U.S.C. 2401(b); (3) Dyniewicz v. United States, 742 F.2d 484 (9th Cir. 1984): Miller v. United States, 741 F.2d 148 (7th Cir. 1984); Bialowas v. United States, 443 F.2d 1047, 1048-49 (3rd Cir. 1971). Finally, the FTCA specifically excludes the common law tort of malicious prosecution as a possible claim against the government and its agents. See U.S.C. 2680(h). (4)

(2) The FTCA acts as a waiver of the United States' sovereign immunity as to certain claims. The Act sets forth the terms and conditions of the government's consent to be sued, limiting and defining the jurisdiction of any court to entertain an action against the United States and its employees.

(3) "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b).

(4) This exception does not apply to investigative and law enforcement officers, i.e., "any officer of the United States who is empowered by the law to execute searches, to seize evidence, or to make arrests for violation of Federal Law." 2680(h). Therefore, while the U.S. government, its attorneys, and judges maintain blanket immunity against the claim of malicious

prosecution, FBI agents are not immune. However, while Sharwell accuses the FBI of withholding evidence, he does not specifically name the, as defendants. Regardless, such claim would still be barred under 2675(a) and 2401(b).

Because Sharwell never filled any administrative claim with any agency regarding the conduct about which he complains, and because his complaint primarily asserts claims for malicious prosecution, his complaint appears subject to dismissal under any one or all of the theories upon which the defendants rely. Because pro se pleadings are to be liberally construed, however, the Court declines to end its inquiry at this point.

The FTCA deals with traditional tort claims against government employees, e.g., personal injury, and its terms cannot be used to limit constitutional claims, whether assert able directly under the Constitution or under some other statutory provision, such as 42 U.S.C. 1983. Thus, the argument that the plaintiff's claim should be dismissed because he has not exhausted administrative remedies within appropriate time, though often asserted by the government, routinely is rejected by the courts, where the plaintiff asserts that it is the United States Constitution which provides the substantive basis for his claims. See Octoyne v. United States, 903 F. Supp. 357, 360-61 (E. D. N. Y. 1995) (noting frequency with which the government makes the argument and rejecting it): Osijo v. United States, 850 F. Supp. 992-93 (W.D.H.Y. 1994).

Here, although Sharwell entitles his action "Complaint for Illegal Prosecution," it is possible that he is also bringing constitutional claims. Indeed, his complaint makes specific reference to violations of "constitutional and civil rights." (Complaint 3). If this is

the case, the FTCA's statutory bar on plaintiff's ability to bring this action would not apply.

Even if Sharwell's complaint does raise veiled constitutional claims, however, those claims are still barred by the applicable statute of limitations. In Wilson v. Garcia, 471 U.S. 261 (1985), the Supreme Court held that federal district courts should borrow the state's most closely analogous statute of limitations for actions arising under the constitution. Consistent with the Supreme Court's directive, the Sixth Circuit has found that personal injury causes of action are analogous to civil rights claims for statute of limitations purposes. Browning v. Pendleton, 869 F. 2d 989 (6th Cir. 1989). Thus, the two-year statute of limitations for personal injury actions designated in Ohio Revised Code 2305.10 governs civil rights actions brought in Ohio courts. Browning at 992; Kurinsky v. USA, 33 F.2d 1002 (6th Cir. 1987); Harris v. Muchnicki, 932 F. Supp. 192, 194-95 (N.D. Ohio1996).

Jack Sharwell alleges he was improperly investigated, arrested, and indicted in 1976. Yet he did not file his lawsuit for over twenty years- until March, 1999. To the extent that Sharwell raises constitutional claims, these claims are barred by Ohio's two years statute of limitations for personal injury actions. To the extent that Sharwell raises the traditional tort claim of malicious prosecution, this claim is expressly barred by several provisions of the FTCA, as outlined above. Thus this action cannot proceed. (5)

(5) Sharwell's malicious prosecution claims are dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

III. Conclusion

Accordingly, for the above reasons, defendants Motion to Dismiss is **GRANTED**. This case is **DISMISSED**.

IT IS SO ORDERED

_____

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX

C

CR 76 389

FILLED
NOV 10 1976
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
September 1976 Grand Jury

UNITED STATES OF AMERICA Plaintiff, v JACK AUSTIN SHARWELL, aka Jack Stevens, D. Stevens) doing business as J. S. International, Inc. and Marbon Distributors, Inc., Defendant.	)CASES NO 76-1368) INDICTMENT) (18 U.S.C. 1343: Wire Fraud;) 18 U.S.C. 2: Causing Acts to be Done)

Grand Jury charges:

COUNT ONE

(18 U.S.C. 1343; 2)

Commencing on or about March 1, 1973, and continuing through on or about February 1, 1975, within the Central District of California and elsewhere, defendant JACK AUSTIN SHARWELL, who is also known as Jack Stevens, D. Stevens, J, Stevens and R. Steven unindicted accomplice Ira L. Weisman, also known as John Milburn, unidicted accomplice Haung Ts'ung-sheng, also known as Tommy Huang, and other persons both known and unknown to the Grand Jury who are not indicted herein, did knowingly and willfully cause interstate and foreign wire communications,

namely telephone calls, wire transfers of funds and wire transfers of international letters of credits, to be used for the purpose of executing a

scheme and artifice to defraud, which scheme the defendant and unindicted accomplices had devised and intended to devise, in violation of Section 1343 of title 18 of the United States Code.

Among the objects of said scheme and the means by which the defendant would and did carry out said scheme were the following:

A. It was a part of said scheme and artifice that the defendant would and did devise and intended to devise a scheme to defraud numerous companies doing business in Japan and in Taiwan in the Republic of China, by causing such companies to purchase large quantities of industrial plastic resins from him, when in fact he neither had such resins nor intended to deliver such resins to the victim companies;

B. It was further part of said scheme that, in order to conceal the identities of the perpetrators and to facilitate the execution of the scheme, the defendant would and did cause sham companies to be created and utilized as fronts for his operations, among which were the following:

1. J.S. International, Inc.
   8060 Melrose Boulevard, Suite 200
   Los Angeles, California; and
   72-16 244th Street
   Douglaston, New York;
2. Marbon Distributors, Inc.
   520 Fifth Avenue
   New York, New York
3. Boom World Wide Corporation
   15 Nanking East Road, Section 5
   Taipei, Taiwan; and
4. Far East Superintendence Co.
   also known as "Faresco".

C. It was further part of said scheme that, in order to further conceal the identities of the

perpetrators and to facilitate the execution of the scheme, the defendant would and did use and cause fictitious and assumed names to be used, among which were the following:

1. Jack Stevens
2. J. Stevens
3. D. Stevens
4. R. Stevens
5. Hal Rothstone
6. Allen Meyers; and
7. John Milburn

D. It was a further part of said scheme that, in order to solicit the business of industrial concerns in Taiwan and Japan, the defendant would and did cause advertisements for high-grade plastic resins to be placed in commercial newspapers in the far east;

E. It was a further part of said scheme that the defendant would and did accept and cause orders for plastic resins from Taiwanese and Japanese companies to transmit international letters of credit in favor of J. S. International from the Far East to the United States;

F. It was a further part of said scheme that, in response to the aforementioned advertisements, the defendant would and did cause representatives of the Japanese and Taiwanese companies to contact the defendant by international telephonic communications to contact the "local representative" of J. S. International, unindicted accomplice Tommy Huang of Boom World Wide Corporation;

G. It was a further part of said scheme that, after agreeing to sell resins to the Japanese and Taiwanese companies, among others to transmit international letters of credit in the following amounts from the Far East to banks in Los Angles and San Francisco, California:

Company	Letter of Credit Number	Issuing Bank Amount
MAEDA Ind. Chemicals Co., Ltd., Japan	252-500-11734	Dai-Ichi Kangyo Bank Ltd. $120,000.00
EI-EN Ent Co, Japan	Z-11878	Mitsui Bank of Tokyo $47,160.00
NANRI TRADING Co. Ltd., Kobe, Japan	L-0671834	Bank of Tokyo Ltd., Japan $67,650.00
CHI MEI Trading Co. Taipei, Taiwan	CCE5818	Taipei Branch First National City Bank, L.A. $185,460.00
TEE LEE Trading Co. International Corp., Taipei	CCE5916	Taipei Branch First National City Bank, L.A. $18,869.76
TEE LEE Trading Co. International	CCE9917	Taipei Branch First National City Bank, L.A. $39,142.50
Kaohsiung Pulp & Paper Co., Taiwan	CCE5919	Taipei Branch First National City Bank, L.A. $185,460.00

Company	Letter of Credit Number	Issuing Bank Amount
HSIEH HSING Ind Co., Ltd., Taipei, Taiwan	H215819	HUA NAN Com Bank, Ltd., Taipei $24,000.00
Sanpo Electric Co., Ltd., Taipei	H214902	HUA NAN Com Bank, Ltd., Taipei $69,250.00
Yi Long Trading Co., Ltd., Taipei	1151/10084	Chang HWA Com Bank, Ltd., Taipei $14,400.00
Kaohsiung Plastic Ind Co. Kaohsiung, Taiwan	Nu-0581	International Com Bank of China $135,000.00
Chuan Ming Bambos Prod, Co., Hsien, Taiwan	1151/09122	Chang Hwa Com Bank Ltd. $18,180.00
Advance Plastics Co., Ltd., Taipei Kaohsiung, Taiwan	KB21185	HUA NAN Com Bank, Ltd., Taipei $6,340.00
IDA TRADING Co., Ltd Taipei	1151/10825	Chang Hwa Com Bank Ltd. $52,190.00
PANDOK CO., Ltd., Taipei	1151/10629	Chang Hwa Com Bank Ltd. $18,000.00

Company	Letter of Credit Number	Issuing Bank Amount
Advance Plastics Co., Ltd., Taiwan	574703-8	First Commercial Bank of Taiwan $8,025.00
TA CHANG Ind, Co.,Ltd., Taipei	E66756-A	Chang Hwa Com Bank Ltd. $65,237.50
SANPO Electric Manufacturing Co. Ltd., Taipei	E65545A	First Com Bank Bank of Taiwan $18,681.00
SANPO Electric Manufacturing Co. Ltd., Taipei	E65544A	First Com Bank Bank of Taiwan $31,135.00
TA Chang Ind, Co.,Ltd., Taipei	E66756-A or E66956-A	Chang Hwa Com Bank Ltd. $24,000.00
TATUNG Co. Taipei	E66476-A	Hua Na Com Bank Ltd Taipei $140,800.00
Trio Ind Co., Ltd Taipei	E65840-A	Bank of Communi-catios Taipei, Taiwan $13,000.00
Greenwood Plastics Manufacturing Co., Taipei	E66583-A	Bank of Communi-catios Taipei, Taiwan $16,000.00

H. It was a further part of said scheme that, once letters of credit were opened and lodged with banks in the United States, the defendant would and did further endeavors to conceal his scheme by causing sham "orders" for plastic resins to be placed by J. S. International with Marbon Distributors, Inc., each of which sham company was a front for the defendant's operations;

I. It was a further part of said scheme that, acting in the name of Marbon Distributors, Inc., the defendant would and did cause large quantities of waste paper to be procured, bailed and containerized for shipment by sea to Japan and Taiwan;

J. It was further part of said scheme that, using another of his sham companies, Faresco, the defendant would and did cause the containers filled with waste paper to be "inspected" and "certified" as a legitimate shipment of plastic resins;

K. It was a further part of said scheme that, upon displaying proof that certified shipments of plastic resins had been sent to the Far East, the defendant would and did negotiate and cause the letters of credit previously lodged with American banks to be negotiated;

M. It was a further part of said scheme that the defendant would and did then cause in excess of $1,030,000.00 obtained from letters of credit to be deposited in J. S. International and Marbon bank accounts, withdrawn primarily in cash, and thus lost to victim companies;

N. It was a further part of said scheme that, when containers filled with waste paper began arriving in the Far East, the defendant would and did endeavor to cause the victim companies to be lulled into believing that inadvertent mistakes in shipping had been made, in order to gain more time to negotiate the remainder of

the approximately $3,000,000 in international letters of credit opened and lodged with American banks by Taiwanese and Japanese companies for the purchase of industrial plastic resins.

On or about October 26, ~~1978~~ 1973, within the Central District of California, defendant Jack Austin Sharwell, for the purpose of executing the aforesaid scheme and artifice to defraud, knowing and willfully caused an international letter of credit in the amount of $185,460 to be transmitted by means of international wire communications from Taipei, Taiwan Branch of First National City Bank to the Los Angles, California Branch of First National City Bank, by the Chi Mei Trading Company, Ltd., Payable to J. S. International.

COUNT TWO
(18 U.S.C. 1343;2)

The Grand Jury hereby realleges and incorporates all of the allegations set forth in Count One of this indictment, with the exception of the last paragraph thereof, as though fully set forth herein.

On or about December 12, 1973, within the Central District of California, defendant JACK AUSTIN SHARWELL, for the purpose of executing the aforesaid scheme and artifice to defraud, knowing and willfully caused an international letter of credit in the amount of $140,800.00 to be transmitted by means of international wire communications from Hua Na Commercial Bank, Ltd., in Taipei, Taiwan, to the Bank of America in Los Angeles, California, by the Tatung, payable to J. S. International.

COUNT THREE
(18 U.S.C. 1343;2)

The Grand Jury hereby realleges and incorporates all of the allegations set forth in Count One of this indictment, with the exception of the last paragraph thereof, as though fully set forth herein.

On or about December 12, 1973, within the Central District of California, defendant JACK AUSTIN SHARWELL, for the purpose of executing the aforesaid scheme and artifice to defraud, knowing and willfully caused an international letter of credit in the amount of $120,000.00 to be transmitted by means of international wire communications from Osaka, Japan, to Los Angeles, California, by the Dai-Ichi Kangyo Bank Ltd., acting on behalf of the Maeda Industrial Chemicals Company, Ltd., payable to J. S. International.

A TRUE BILL

_____
Foreman

_____
WILLIAM D. KELLER
United States Attorney

APPENDIX

D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
	)Criminal Action
vs.	)No. CR 76-389
	)
JACK AUSTIN SHARWELL,	)
	)
Defendant.	)

TRANSCRIPT OF PROCEEDINGS HAD BEFORE HON. JOHN M. MANOS, JUDGE OF SAID COURT, ON THURSDAY, THE 16TH DAY OF DECEMBER 1976.

APPEARANCES:

On behalf of the Government:

Herbert M. Jerkowitz
Assistant U.S. Attorney

On behalf of the Defendant:
Morris R. Blane, Esq.

THURSDAY, DECEMBER 16, 1976, 8:45 A.M.

THE COURT: We're here on a Rule 20 matter, Mr. Berkowitz?

MR. BERKOWITZ: Yes, your Honor.

Mr. Sharwell was indicted in the Central District of California in a three-count indictment charging him with violating Title 10, Section, 1343, which is wire fraud, and Section 2, which is aiding and abetting.

Mr. Sharwell executed a consent to transfer pursuant to Rule 20 for plea and sentence, signed and witnessed by his counsel of record and approved by the Central District of California.

The case is now before this Court for the purpose of accepting a plea.

THE COURT: Mr. Blane, has the defendant received a copy of the indictment, sir?

MR. BLANE: I've been advised he has.

THE COURT: Has he read the indictment?

MR. BLANE: I've been advised he has.

THE COURT: Does he understand the indictment?

MR. BLANE: I have been advised he does.

THE COURT: Does he waive the reading of the indictment?

MR. BLANE: He does waive the reading.

THE COURT: Do you so waive the reading of the indictment, sir?

MR. BLANE: Do you want it re-read to you now? He waives it. The question my client adds is there is one count, is that correct?

MR. BERKOWITZ: He has been indicted on three counts, but the understanding is that he will plead to one

count and the other two counts will be dismissed at the time of sentencing.

THE COURT: Do you waive a reading of the indictment?

MR. BLANE: He does, your Honor.

THE DEFENDANT: Yes.

THE COURT: Can I hear a yes or no?

THE DEFENDANT: Yes.

THE COURT: I'll read the indictment if you want.

THE DEFENDANT: I'd like to read it.

MR. BLANE: Do you want to read it?

THE DEFENDANT: Yeah, I've never seen it.

THE COURT: I am going to retire to my Chambers. Give him a copy of the indictment, let him read the indictment, let him read the count.

THE DEFENDANT: Excuse me.

THE COURT: You will not be excused. Read the count that we understand he is going to enter a plea of guilty to. Otherwise, maybe the better thing to do is to have the marshals return him to California for purposes of appearing there for the purpose of having them tell him what this indictment is about.

MR. BERKOWITZ: Fine your Honor.

THE COURT: We stand recessed.

(Recess taken.)

THE COURT: Has the defendant received a copy of the indictment, Mr. Blane, and has he read it?

MR. BLANE: He has.

THE COURT: Does he understand it?

MR. BLANE: And he understands it.

THE COURT Does he waive the reading of the indictment?

MR. BLANE: He does waive the reading.

THE COURT: Do you waive the reading of the indictment?

THE DEFENDANT: Yes.

THE COURT: Is the understanding which I heard, indicated by Mr. Berkowitz, the understanding of this defendant that at this point, based on an agreement under Rule 20, he is prepared to enter a plea of guilty to the charge under the indictment as to one of the counts of the indictment?

MR. BLANE: That is true.

THE COURT: Is that so, Sir?

THE DEFENDANT: Yes.

THE COURT: Mr. Sharwell, do you understand that you are entitled to a trial by jury, sir?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you may waive your right to a trial by jury and be tried by this Court?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you needn't take the stand to testify against yourself if you should go to trial?

THE DEFENDANT: Yes.

THE COURT: Do you understand that there is a compulsory process by which witnesses may be produced who will testify in your behalf during the course of the trial, if you go to trial?

THE DEFENDANT: Yes.

THE COURT: Do you understand, sir, that by entering a plea of guilty to one count under the indictment you waive the right to a trial by jury?

THE DEFENDANT: Yes.

THE COURT: What is the penalty?

MR. BERKOWITZ: Your Honor, the charge, which Mr. Sharwell has been indicted, is punishable by a maximum of $1,000 and 5 years imprisonment.

THE COURT: Do you understand that the maximum penalty is $1,000 fine and 5 years incarceration or both?

THE DEFENDANT: Yes.

THE COURT: Has anyone made any promise to you or threatened you in any way to enter into this plea of guilty?

THE DEFENDANT: No.

THE COURT: Sir, the charge is that you knowingly and willfully, along with others who are unindicted defendants, caused interstate and foreign wire communications, namely, telephone calls and wire transfers of funds and wire transfers of international letters of credit to be used for the purpose of executing a scheme or artifice to defraud, which scheme you and your accomplices, who remain unindicted, had devised and intended to devise in violation of Section 143 of Title 18 of the United States Code.

Did you on October 26, 1973, within the Central District of California for the purpose of executing the aforesaid scheme and artifices to defraud knowingly and willfully cause an International letter of credit in the amount of $185,400 to be transmitted by means of international wire communications from the Taipei, Taiwan Branch of the First National City Bank to the Los Angeles, California Branch of the First National City Bank, by the Chi Mei Trading Company, Ltd., payable to J. S. International?

Did you commit the act I just recited?

THE DEFENDANT: I believe I did, your Honor. I'm not sure. I would say yes.

THE COURT: Pardon?

THE DEFENDANT: Yes.

THE COURT: Well, sir, you said, "I believe I committed the act. I'm not certain." Now you say yes.

Did you on October 26, 1973, within the Central District of California, for the purpose of executing the scheme I just indicated and artifice to defraud, knowingly and willfully cause an international letter of credit in the amount of $185,460 to be transmitted by means of international wire communications from the Taipei, Taiwan Branch of First National City Bank to the Los Angeles, California Branch of First National City Bank, by the Chi Mei Trading Company, Ltd., payable to J. S. International?

THE DEFENDANT: Yes.

THE COURT: Is there doubt in your mind, Mr. Sharwell, that this act with which you are charged was committed by you?

THE DEFENDANT: No.

THE COURT: You understood me clearly when I indicated to you that you are entitled to a trial by jury under any charge that is returned against you?

THE DEFENDANT: Yes.

THE COURT: You want to proceed to a trial by jury?

THE DEFENDANT: No.

THE COURT: The Court will make a finding that this defendant committed the act charged under the indictment.

How do you plead?

THE DEFENDANT: Guilty.

THE COURT: The Court will accept this defendant's plea of guilty and make a finding that he knowingly and voluntarily entered the plea.
Mr. Blane?

MR. BLANE: Your Honor, I will say that I have known the Sharwell family for many, many years. They have always enjoyed a find reputation.

At present Mr. Sharwell has his wife, his children. He is a resident of the City of Cleveland. He has no really visible means of support now.

And I will represent to the Court that he will do anything and everything and abide by all the Court's wishes and demands that the Court sees fit to impose upon him. But if it is possible to maintain a personal bond, I'm certain that there will be no injustice done. If he has any passport, well submit it to the Court.

THE COURT: Not if he has. Does he?

THE DEFENDANT: Yes, sir, I have one passport.

THE COURT: Do you have that?

THE DEFENDANT: I have a passport that is valid today. I have my old one, unvalid.

MR. BLANE: I want you to submit those to the Court and abide by all rules and regulations that the Court will impose upon you.

What business, what income, do you have at present?

THE COURT: I'm not interested in knowing what his income is or what he has, Mr. Blane.

Are you asking that I refer the defendant to the probation department for a pre-sentence report?

MR. BLANE: I'd appreciate it if you would. I will also say this, that merely from the information that I have been able to ascertain that he was advised by the

District Attorney's office in California that they would recommend a personal bond. That's all –the only information that I have. Now, I'm sure it is discretionary.

THE COURT: From whom do you have that information?

THE DEFENDANT: Can I speak, your Honor? Mr. Sheridan got that information from Mr. John Hanslick, the U.S.—

MR. BLANE: His local counsel in California.

THE DEFENDANT: In California, got that information from Mr. John Hanslick, Assistant U.S. Attorney in Los Angeles.

THE COURT: Do you have some information?

MR. BERKOWITZ: Your Honor, it is my understanding and information that Assistant U.S. Attorney Hanslick did recommend a $10,000 personal bond for the purpose of allowing Mr. Sharwell to report to the Marshals in Cleveland upon point of surrender rather than to cause him to surrender himself in California or cause the Marshals to seek him out there.

At that time, of course, an indictment has been returned with no arraignment had or any plea been established.

THE COURT: What is the recommendation of the Government?

MR. BERKOWITZ: Your Honor, considering the nature of the charges, the amount of money involved, the fact that Mr. Sharwell is currently on probation to this Court, the Government feels that personal bond is no longer called for Defendant is now, has been found guilty of a fraud in the millions of dollars. And the government feels

that in order to insure Mr. Sharwell's appearance that a bond be increased and the Government would recommend to the Court that it raise bond to $100,000 corporate surety, and in addition, to attach as a condition to the bond the surrendering of the passports.

MR. BLANE: Your Honor, if it is possible, and I speak with tongue in cheek, financially he is not able to raise that type of a bond. I do believe that we will make every effort to comply with a minimum bond if it is at all imposed, because he does have his family here sitting in the courtroom here. They are living in the City of Cleveland. He comes from a reputable family here.

The purpose of the bond is his assurance to be present at any time that the Court will see fit to impose sentence. And I certainly would implore this Court to set a minimum bond in this instance.

THE COURT: Would you have a seat? Have you the probation report of the previous matter?

MR. LEJOI: Yes.

(Discussion ensued off the record at side bar.)

THE COURT: Approach the bench.

The Government has recommended a hundred thousand dollars corporate surety bond, Mr. Blane.

The fact that you have indicated to me that this man has been known to you for a period of many, many years, that he is a family man, he resides here in Cleveland, his family is here, I will not accept the recommendation of the Government.

I am going to impose a $10,000 surety bond, corporate surety bond to assure that he will return at the time the pre-sentence report is made. He may remain free on $10,000 corporate surety bond. He will reappear at the time we have the pre-sentence report prepared.

He will be summoned at that time, and at that time we will make final disposition.

Referred to the probation department for pre-sentence report.

The bond that I impose is $10,000 corporate surety bond and the understanding is that at the time when there is total disposition, the other counts of the indictment will be dismissed, is that correct?

MR. BERKOWITZ: That is correct. Your Honor, do I understand that the Court is not going to require the surrendering to the passport as a condition?

THE COURT: The passports as a condition, in referring this case to the Probation

Department for a pre-sentence report, is that he turn over any and all passports that he may have or has or has applied for. Let there be no doubt about that.

At this point we stand recessed.

MR. BLANE: Thank you.

CERTIFICATE

I, Robert J. Kitchen, Official Court Reporter in and for the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings herein.

_____

Official Court Reporter

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	)Criminal Action
JACK AUSTIN SHARWELL, Defendant.	)No. CR 76-389

TRANSCRIPT OF PROCEEDINGS HAD BEFORE HON. JOHN M. MANOS, JUDGE OF SAID COURT, ON FRIDAY, THE 14TH DAY OF JANUARY, 1977, AT 9:00 O'CLOCK A. M.

APPEARANCES:

On behalf of the Government:

Herbert M. Berkowitz, Asst. U.S. Attorney.

On behalf of the Defendant:

Morris R. Blane, Esq.

FRIDAY, JANUARY 14, 1977, 9:00 O'CLOCK A.M.

THE COURT: Mr. Blane, I have a copy of the pre-sentence report. I have gone over it very carefully. We are here now for final disposition in the matter of Jack Sharwell.

Mr. Sharwell, is there anything you have to say to the Court before it imposes sentence?

THE DEFENDANT: No, sir.

THE COURT: Mr. Blane?

MR. BLANE: Your Honor, at the onset let me state to the Court that my client realizes that he has committed a wrong and for which he's extremely regretful now.

This violation occurred about, a little over three years ago. As a result, and I'm sure that the probation report will indicate it was the machinations of some individual by the name of Ira Wasman who concocted this scheme, and unfortunately my client was gullible enough to go along with the situation. This Ira Wasman was going to die and wanted to create as much funds as possible, and of certainty he did pass away. It doesn't take away from any fact that my client thought he was going to become a rich man, became gullible only because of the influence that this Ira Wasman had upon him.

In addition I'm sure that the Court has been informed by the Probation Department that he's a married man, has three children, one in college and one daughter sitting in the courtroom here. His wife is presently being treated at Cleveland Clinic. My client presently is under prescribed medication.

He's a member of our Park Synagogue here in the City of Cleveland. He's an extremely fine family man.

And if it is possible, your Honor, I would like to state that incarceration itself is not a cure for fraud. In my humble opinion probation is more beneficial for the rehabilitation of any individual knowing that he has an alleged club over his head to oversee him. The cost to the community of probation is practically nil. In the meantime he can maintain a family life.

Your Honor, I would appreciate if probation can be extended to my client so that he can be an outstanding member of our community and a good husband and a good father.

THE COURT: Mr. Berkowitz.

MR. BERKOWITZ: Thank you, your Honor.

Your Honor, the government is cognizant of the Court's examination into this background of this case and background of this individual. And I would not be so presumptuous as to take up much of the Court's time with regard to the matter and as a representative of the government.

But I feel that the nature of this case and the nature of Mr. Sharwell's prior conduct warrants some comment on behalf of the government with regard to possible sentence. The probation report in this case as always is an excellent report, and I would not repeat anything in that. But I would like just to emphasize to the Court and stress the trend that appears in the report.

The substantive case involves a fraud in which in excess of a million dollars was taken. Mr. Sharwell has previously been convicted in Federal Court of an offense which resulted in a fraud of a quarter of a million dollars. There are several civil actions against him in large amounts of money.

Yet the probation report indicates that Mr. Sharwell is receiving unemployment compensation, has tremendous debts, yet he still maintains an apartment which costs better than $500 a month.

Clearly this man has a way of life which requires custodial supervision. His activity has shown beyond any question that a pen can be an awesome weapon in the hands of someone with a larcenous heart. Your Honor, if he had burgled a bank and taken a million dollars, the punishment would be swift and severe. Yet here is a crime almost of silence, here is a man who through the machinations and ability to handle proceedings can steal better than a million three hundred thousand dollars through some unwary businessman.

If ever a non-violent crime called out for stern treatment, this one does.

The defendant here doesn't need rehabilitation. He's proved business genius. He's shown that he has made an intelligent, knowing decision to follow a criminal course of conduct. It's important that other potential victims of his larcenies be protected.

It is also important, your Honor, that in white collar crimes such as this a message be delivered, and that message is that the Court in the Northern District of Ohio will deal swiftly with white collar criminals as it deals with violent criminals, and that this type of criminal behavior will simply not be tolerated here in the Northern District of Ohio.

For these reasons, your Honor, the government would ask that the Court impose stern punishment and would further ask that the maximum penalty of five years imprisonment be imposed.

Thank you, your Honor.

THE COURT: I would ask you to strike the last comment that you just made about imposition the Court ought to make.

The Court neither accepts a recommendation from the District Attorney's Office, nor that of the defendant. The Court makes up its own mind based on all the facts.

MR. BERKOWITZ: I understand that, and I apologize and withdraw that comment.

THE COURT: Withdrawn.

Mr. Blane, I have some deep thoughts about this defendant, but because his daughter is in the courtroom I will constrain from indicating my reaction to what I have see. I won't embarrass him.

I commit you, sentence you to the custody of the Attorney General for five years under Title 18 Section 4205(a).

Mr. Blane, anything further?

MR. BLANE: Your Honor, if it be possible, I would like to have him, if through the Court's generosity, surrender himself to an institution designated by the Bureau of Prisons, and if possible to defer sentence for two weeks.

THE COURT: For the record, Mr. Berkowitz.

MR. BERKOWITZ: Your Honor, the government has no objection to that.

THE COURT: I am somewhat reluctant to extend to you that request. I think he should proceed to serve his sentence and to be whisked away to the correctional institution to which the government is going to send him.

What is going to be accomplished, Mr. Blane, be deferring sentence for two weeks? What is going to be accomplished by allowing him to voluntarily commit

himself or appear at the institution to which he's going to be confined?

MR. BLANE: Your Honor, I can speak of personal knowledge that any local state institution are all overcrowded, no matter what community, whether it is Cuyahoga County, Medina County.

THE COURT: Does this man have some business – that is not a factor, Mr. Blane.

MR. BLANE: He has some---

THE COURT: Just a second. We have institutions. These institutions are not the best kind of institutions, we all recognize this. But we are doing the best we can with what we have got. That isn't a reason for me not to commit Mr. Sharwell immediately. Is there something that he yet has to do?

MR. BLANE: He does, definitely.

THE COURT: You say his wife is ill?

MR. BLANE: His wife is ill and he has to make arrangements for his three children to see that they're situated in the proper home.

THE COURT: Only on that ground that he has to make arrangements for his three children, and knowing you I accept that which you tell me as being the fact. Knowing you a long time, you never uttered to me any statement that you didn't back up. I'll accept that.

On that ground I'll defer sentence for two weeks, allow him to voluntarily appear at the institution to which he is to be committed.

I just want Mr. Sharwell to understand that if we have any problem of any kind, any problem of any kind there will be some stern punishment meted out. Do I make myself clear, Mr. Blane?

MR. BLANE: Certainly. I will imply that to my client.

THE COURT: Sentence deferred.

MR. BERKOWITZ: Your Honor, at this point the government would move to dismiss Counts 2 and 3 of the indictment.

THE COURT: So ordered. Sentence deferred for two weeks, after which he will voluntarily appear at the institution to which he is to be confined.

MR. BLANE: Thank you, your Honor. I'm sure that he will.

THE COURT: We stand recessed.

(Thereupon court adjourned.)

CERTIFICATE

I, Robert J. Kitchen, Official Court Reporter for the United States District Court, Northern District of Ohio, Eastern Division, do hereby certify that the above and foregoing is a true and correct transcript of the proceeding herein.

_____

Official Court Reporter.

APPENDIX

E

OTHER CIRCUMSTANCES

A. The Court's attention must be addressed to a situation which is deemed critical by counsel for the defendant. During a meeting held with the Assistant United States Attorney, a letter was provided by the Assistant written by a Wayne Javis, an attorney located at 69 W. Washington Street, Chicago, Illinois, which had been to such assistant by special delivery on or about December 13, 1976, three days prior to Jack Sharwell' s plea of guilty. The letter begins with the following language:

> It is my understanding that this letter will be submitted to the court in connection with Mr. Sharwell 's arraignment and guilty plea to one of a three-count indictment which was transferred to your office from Los Angeles.

This letter goes on to state, inter alia, that Mr. Sharwell defrauded his client, St. Paul's Insurance Company. He goes on to state that "St. Paul's New York office has informed me that there are other insurance companies and banks who have made substantial payouts for the account of Mr. Sharwell and corporations in which he possesses an interest."

Obviously the contents of this letter, which was made available to the Probation Department, contain statements which are extremely derogatory and which would influence on the court in the sentencing procedure. Prior counsel for the defendant at the time of sentencing had no knowledge of the assertions contained in the letter so that no attempt could have been made to rebut the comments. Since the presentence report contains statements relating to the St. Paul Insurance Company matter, but does not specifically go into the accusations of the subject letter, it is not known whether the actual letter or its contents were made available to the Court. In any event

fairness dictates that this letter should have been made available to defense counsel prior to sentencing. United States v. perri, 513 F.2d 572(1975). In remanding the case to the District Court for further proceedings, the Court referred to Section 4.4(a) of the American Bar Association Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968) which provides "that fundamental fairness to the defendants requires that he and his attorney be told the substance of all derogatory information which adversely affects his interest and which has not otherwise been disclosed in open court." See also Gardner v. State of Florida, 45 L.W. 4275 (March 22, 1977)

B. In meetings had with all parties, except the Court, connected with the sentencing procedure, it became apparent that a critical factor in their recommendation to the Court of the full sentence imposed was the amount of money involved in the scheme to which the defendant pled guilty. While not wishing to completely disregard the dollars involved, it is strongly submitted that dollars in and of itself should have little bearing on the sentence. Other factors, such as injury to society, should, it is believed, play a more important role than the amount involved.

C. Assuming the Court agrees with a basic premise propounded in the motion to the effect that an important aspect of sentencing is to facilitate rehabilitation of the offender, it is respectfully submitted that the defendant's confinement at Sandstone all but eliminates that possibility. Aside from the lack of therapeutic treatment at Sandstone, the distance the institution is from the Cleveland area, where most of the defendant's family resides, all but eliminates that possibility. The long distance and finances resides, all but eliminates that possibility. The long distances and

finances required to make the trip by his family, under present circumstances, make such trips nearly impossible. Without the close support of his family, including visitation, there can be no rehabilitation.

CONCLUSION

It is earnestly submitted that the interests of justice and full conclusion of the concepts of modern penalogy necessitate this court's substantially reducing the sentence in this matter to the time already spent. In lieu of the pronounced sentence, it is suggested that a strict probationary period be enforced with the defendant agreeing to multiple conditions including his submission to psychological and therapeutic services on a regular and consistent basis or any other conditions that this Court, in its sole discretion, may feel warranted.

Respectfully submitted,

Gaines, Stern, Schwarzald & Robiner Co., L.P.A.

By_____

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Modification of Sentence and attached Brief was hand delivered to Herbert Berkowitz, Assistant United States Attorney, 400 U. S. Courthouse, Cleveland, Ohio this 14 day of April, 1977.

Gaines, Stern, Schwarzald & Robiner Co., L.P.A.

By_____
J. Edwards Friedland and Harold S. Stern
Counsel for Defendant Jack Sharwell